163

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 837.

HENRY BOSTWICK, AS RECEIVER OF THE NATIONAL BANK OF FISHKILL, THE NATIONAL BANK OF FISHKILL, LEWIS H. WHITE, HENRY BOSTWICK, JACOB G. VAN WYCK, HENRY D. SHERWOOD, ET AL., DIRECTORS OF THE NATIONAL BANK OF FISHKILL, PLAINTIFFS IN ERROR,

vs.

THEODORE BRINCKERHOFF, SUING IN HIS OWN BEHALF AND FOR THE BENEFIT OF THE OTHER STOCKHOLDERS OF THE NATIONAL BANK OF FISHKILL.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

FILED MAY 10, 1882.

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INDEX.

	Original.	Print.
Return to writ of error	1	1
Writ of error	2	1
Service of citation and assignment of errors acknowledged	5	2
Citation	6	2
Bond	8	3
Assignment of errors	13	5
Joinder in error	15	6
Proceedings in supreme court	17	7
Summons	18	7
Complaint	19	8
Demurrer	25	11
Opinion	27	12
Judgment (special term)	29	13
Order for judgment	30	14
Bill of exceptions	31	14
Order denying additional allowance	32	15
Notice of appeal to general term	33	15
Affidavit of F. B. Lown on motion for additional allowance	34	16
J. F. Schlosser on motion for additional allowance	35	16
F. B. Lown on motion for additional allowance	36	17
Order granting additional allowance	37	17

	Original.	Print.
Amended notice of appeal	38	18
Order for judgment (general term)	40	19
Judgment (general term)	41	19
Notice of appeal to court of appeals	43	20
Clerk's certificate	44	20
Proceedings in court of appeals	45	21
Judgment in court of appeals	47	21
Opinion in court of appeals	49	22

1 State of New York, court of appeals.

CLERK'S OFFICE,
Albany, March 8, 1882.

The answer of the judges of the court of appeals of the State of New York in the within writ named doth certify, under the seal of our said court, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, and send the record whereof mention in said writ is made, with all things touching or in anywise concerning the same, as appears in the following schedules, as in said writ is commanded, viz: Writ of error; assignment of error; joinder in error; citation and admission of service thereof; copy opinion; copy bond and remittitur.

By the court.

[SEAL.] E. O. PERRIN, *Clerk.*

2 The President of the United States to the honorable the judges of the court of appeals of the State of New York, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said court of appeals, before you, being the highest court of law & equity of the said State in which a decision could be had in the said suit between Theodore Brinckerhoff, suing in his own behalf and for the benefit of the other stockholders of the National Bank of Fishkill, against Henry Bostwick, as receiver of the National Bank of Fishkill; The National Bank of Fishkill, Lewis H. White, Henry Bostwick, Jacob G. Van Wyck, Henry D. Sherwood, Cornelius Remsen, Edmund Lyster, Halsey F. Walcott, Garred DuBois, Oliver W. Barnes, Samuel Heustis, Osmand F. Baxter, & Joseph Van Voorhies, directors of the National *of the National* Bank of Fishkill, wherein was drawn in question the right and privilege claimed under a statute of the United States to be tried for the violations complained of as directors of said national bank in the circuit or district court of
3 the United States, and not in a State court of the State of New York, and the decision was against said right & privilege, a manifest error hath happened, to the great damage of the said defendants above named, as by their complaint appears; and we being willing that the error, if any hath been made, should be corrected, and full and speedy justice done to the parties aforesaid in th*eir* behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you may have the same at Washington on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, *by* the said Supreme Court may cause further to be done therein to correct that error, what *is* right and according to the laws & customs of the United States should be done.

4 Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 10th day of March,

1882, and of the Independence of the United States the one hundred and sixth.

JOSEPH M. DEUEL,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The aforesaid writ of error is allowed.

CHAS. ANDREWS,
Chief Judge C't Appeals of New York.

MARCH 8TH, 1882.

(Indorsed:) U. S. Supreme Court. Henry Bostwick, &c., pl'ff in error, agt. Theodore Brinckerhoff, &c., def'ts in error. Writ of error.

(Also indorsed:) U. S. Supreme Court. Henry Bostwick, rec'r, &c., et al., pl'ffs in error, against Theodore Brinckerhoff, &c., def't in error. Writ of error. Thompson & Weeks, att'ys for pl'ffs in error, 52 Market st., Poughkeepsie, N. Y. E. L. Fancher, of counsel for pl'ffs in error, 229 Broadway, New York City. Due and timely service of a copy of within is hereby admitted.

5 Supreme Court United States.

HENRY BOSTWICK, AS RECEIVER, &C., ET AL., pl'ffs in error,
ag'st
THEODORE BRINKERHOFF, &C., DEF'T IN ERROR.

Due and personal service of a copy of the citation and assignment of errors herein is hereby admitted.

JOHN F. SCHLOSSER,
Att'y for Def't in Error.

6 UNITED STATES OF AMERICA, *ss:*

To Theodore Brinckerhoff, suing in your own behalf & for the benefit of the other stockholders of the National Bank of Fishkill, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, eighteen hundred and eighty-two, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of New York, wherein Henry Bostwick, as receiver of the National Bank of Fishkill, The National Bank of Fishkill, Lewis H. White, Henry Bostwick, Jacob G. Van Wyck, Henry D. Sherwood, Cornelius Remsen, Edward Lyster, Halsey F. Wolcott, Garrett DuBois, Oliver W. Barnes, Samuel Heustis, Osmund F. Baxter, and Joseph Van Voorhis, directors of the National Bank of Fishkill, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

CHAS. ANDREWS,
Chief Judge C't of Appeals, New York.

Dated March 8, 1882.

7 Due and personal service of a copy of enclosed citation is hereby admitted.

(Indorsed:) U. States Supreme Court. Henry Bostwick and others, pl'ff' in error, ag'st Theodore Brinckerhoff, &c., def't in error. Citation.

(Also indorsed:) U. S. Supreme Court. Henry Bostwick, rec'r, &c., et al., pl'ffs in error, against Theodore Brinckerhoff, &c., def't in error. Citation. Thompson & Weeks, att'ys for pl'ff' in error, 52 Market st., Poughkeepsie, N. Y. E. L. Fancher, of counsel for pl'ffs in error, 229 Broadway, N. Y. Due and timely service of a copy of within is hereby admitted.

8 Supreme Court of the United States.

THEODORE BRINCKERHOFF, SUING IN HIS OWN behalf & for the benefit of all other stockholders of the National Bank of Fishkill,
ag'st
HENRY BOSTWICK, AS RECEIVER OF THE NATIONAL Bank of Fishkill, Lewis H. White, Lawrence C. Rapalje, Henry Bostwick, Jacob G. Van Wyck, Henry D. Sherwood, Cornelius Remsen, Edmund Lyslie, Halsey F. Walcott, Garret DuBois, Oliver W. Barnes, Samuel Heustis, Osmund F. Baxter, and Joseph Van Voorhis.

Know all men by these presents that we, Henry Bostwick, Lewis H. White, Jacob G. Van Wyck, Edmund Lyslie, and Frank B. Lown, all of the county of Dutchess & State of New York, are held and firmly bound unto Theodore Brinckerhoff, of Fishkill, in said county, in the sum of one thousand dollars, to be paid to the said Theodore Brinckerhoff, his executors or administrators; to which payment, well and truly to be
9 made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 27th day of January, 1882.

Whereas the above-named Henry Bostwick, Lewis H. White, Jacob G. Van Wyck, & Edmund Lyslie have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judges of the court of appeals of the State of New York:

Now, therefore, the condition of this obligation is such that if the above-named obligors shall prosecute the said writ of error to effect, and answer all damages and costs in case they fail to make good their said plea, then this obligation shall be void; otherwise to remain in full force and virtue.

HENRY BOSTWICK.
EDMUND LUYSTER.
LEWIS H. WHITE.
JACOB G. VAN WYCK.
FRANK B. LOWN.

Sealed and delivered in presence of—
H. W. GILBERT.

10 UNITED STATES OF AMERICA,
Dutchess County, State of New York, ss:

Henry Bostwick, Jacob G. Van Wyck, Edmund Lyslie, Lewis H. White, Frank B. Lown, each being duly sworn, do depose and say, each for himself, that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

HENRY BOSTWICK.
JACOB G. VAN WYCK.
EDMUND LUYSTER.
LEWIS H. WHITE.
FRANK B. LOWN.

Sworn to before me this 27th day of Jan'y, A. D. 1882.

H. W. GILBERT,
Notary Public.

STATE OF NEW YORK,
County of Dutchess, ss:

On this 27th day of January, in the year of our Lord one thousand eight hundred and eighty-two, before me, the subscriber, personally appeared Jacob G. Van Wyck, Edmund Lyster, Lewis H. White, and Frank B. Lown, to me known to be the individuals mentioned in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same.

H. W. GILBERT,
Notary Public.

11 STATE OF NEW YORK,
County of Dutchess, ss:

On this 26th day of January, 1882, before me personally appeared Henry Bostwick, to me known to be one of the individuals mentioned in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

H. W. GILBERT,
Notary Public.

STATE OF NEW YORK,
County of Dutchess, ss:

I, Wilson B. Sheldon, clerk of the county of Dutchess, and of the county courts of said county, and of the supreme court of the State of New York in and for said county, the same being courts of record, do hereby certify that H. W. Gilbert, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was at the time of taking such proof or acknowledgment a notary public
12 in and for the county of Dutchess, dwelling in the said county, commissioned and sworn and duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine. I further certify that said instrument is executed and acknowledged according to the law of the State of New York.

In testimony whereof I have hereunto set my hand and affixed the seal of said courts and county this 8th day of February, 1882.

W. B. SHELDON, *Clerk.*

HENRY BOSTWICK, AS RECEIVER OF THE National Bank of Fishkill, The National Bank of Fishkill, Lewis H. White, Henry Bostwick, Lawrence C. Rapelje, Jacob G. Van Wyck, Henry D. Sherwood, Cornelius Remsen, Edmund Luyster, Halsey F. Walcott, Garrett Du Bois, Oliver W. Barnes, Samuel Huestis, Osmand M. Baxter, & Joseph Van Voorhis, pl'ffs in error,

ag't

THEODORE BRINCKERHOFF, SUING ON HIS OWN behalf and for the benefit of all the other stockholders of the National Bank of Fishkill, def't in error.

Of October term in the year of our Lord one thousand eight hundred & eighty-two.

Afterwards, to wit, on the 2d Monday of October, 1882, in this same term, before the justices of the Supreme Court of the United States at the Capitol, in the city of Washington, come the said plaintiffs in error, by Thompson & Weeks, their attorneys, & say that in the record & proceedings aforesaid there is manifest error in this, to wit, that in the rendition of the judgment of a plea in the court of appeals of the State of New York (being the highest court of law & equity of said State), in a suit brought by Theodore Brinckerhoff, suing in his own behalf and for
14 the benefit of all the other stockholders of the National Bank of Fishkill, ag'st Henry Bostwick, as receiver of the National Bank of Fishkill, The National Bank of Fishkill, Lewis H. White, Henry Bostwick, Jacob G. Van Wyck, Henry D. Sherwood, Cornelius Remsen, Edmund Luyster, Halsey F. Walcott, Garrett Dubois, Oliver W. Barnes, Samuel Heustis, Osmand F. Baxter, and Joseph Van Voorhis, directors of the National Bank of Fishkill, wherein was drawn in question the right and privilege claimed under a statute of the United States to be tried for the violations complained of, as directors of said National Bank, in the circuit or district court of the United States, and not in a State court of the State of New York, the decision of said court of appeals was against said right and privilege; and further that in said suit, brought as aforesaid, wherein was drawn in question the sole and exclusive right of the Comptroller of the Currency of the United States to bring such action in his name of office, under the provisions of a statute of the United States, the decision of said court of appeals was against such sole and exclusive right being in said comptroller in his said name of office.

And the said directors, being the plaintiffs in error herein, pray that the judgment aforesaid may be reversed, annulled, & altogether held for naught, and that they may be restored to all the things which they have lost by occasion of the said judgment.

THOMPSON & WEEKS,
Att'ys for Pl'ffs in Error, Poughkeepsie, N. Y.

(Indorsed:) U. S. Supreme Court. Henry Bostwick, as rec'r, &c., et al., pl'ffs in error, ag'st Theodore Brinckerhoff, &c., def't in error. Assignment of errors. Thompson & Weeks, att'ys for pl'ffs in error, Poughkeepsie.

15 Supreme Court United States.

HENRY BOSTWICK, AS RECEIVER OF THE National Bank of Fishkill, The National Bank of Fishkill, Lewis H. White, Henry Bostwick, Lawrence C. Rapelje, Jacob G. Van Wyck, Henry D. Sherwood, Cornelius Remsen, Edmund Luyster, Halsey F. Walcott, Garrett DuBois, Oliver W. Barnes, Samuel Hustis, Osmand M. Baxter, and Joseph Van Voorhis, pl'ff in error,
ag'st
THEODORE BRINCKERHOFF, SUING ON HIS OWN behalf and for the benefit of all the other stockholders of the National Bank of Fishkill, def't in error.
October term, 1882.

And afterwards, to wit, on the 2d Monday in October, 1882, Theodore Brinckerhoff, by John F. Schlosser, his attorney, comes here into court and says that the record and proceedings aforesaid contain no final judgment or decree, but only an interlocutory judgment overruling a demurrer to the complaint, with leave to the defendants to answer the com-
16 plaint, on payment of costs, and that no writ of error can lawfully be had or issued to re-examine the said record or proceedings.

And without waiving the above objection, but always insisting thereon, he further says that there is no error either in the record or in the proceedings aforesaid, or in the giving of the judgment aforesaid, and he prays that the said writ of error may be quashed and dismissed; but if the said Supreme Court of judicature, before the justices thereof, shall nevertheless decide to proceed to examine the record and proceedings aforesaid, as well as the matters aforesaid above assigned for error, then he prays that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

JOHN F. SCHLOSSER,
Att'y for Def't in Error, Fishkill Landing, N. Y.

(Indorsed:) United States Supreme Court. Henry Bostwick, r'c'r, et al., pl'ff in error, ag'st Theodore Brinckerhoff et al., def't in error. Copy. Joinder in error. John F. Schlosser, att'y for def't in error, Fishkill Landing, N. Y. To E. O. Perrin, esq., clerk court appeals.

17 N. Y. supreme court.

COUNTY OF DUTCHESS:

THEODORE BRINCKERHOFF, SUING ON HIS OWN behalf and for the benefit of all the other stockholders of The National Bank of Fishkill, appellants,

against

HENRY BOSTWICK, AS RECEIVER OF THE National Bank of Fishkill, The National Bank of Fishkill, Lewis H. White, Lawrence C. Rapelje, Henry Bostwick, Jacob G. Van Wyck, Henry D. Sherwood, Cornelius Remsen, Edmund Luyster, Halsey F. Walcott, Garrett DuBois, Oliver W. Barnes, Samuel Hustis, Osmand M. Baxter, and Joseph Van Voorhis, respondents. } Case.

This action was begun by the service of a summons.

18 Supreme court, county of Dutchess.

THEODORE BRINCKERHOFF, SUING ON HIS OWN behalf and for the benefit of all the other stockholders of The National Bank of Fishkill,

against

HENRY BOSTWICK, AS RECEIVER OF THE National Bank of Fishkill, The National Bank of Fishkill, Lewis H. White, Lawrence C. Rapelje, Henry Bostwick, Jacob G. Van Wyck, Henry D. Sherwood, Cornelius Remsen, Edmund Luyster, Halsey F. Walcott, Garrett DuBois, Oliver W. Barnes, Samuel Hustis, Osmand M. Baxter, and Joseph Van Voorhis.

To the above named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated January 10, 1880.

JOHN F. SCHLOSSER,
Plaintiff's Attorney.

Post-office and office address: Fishkill Landing, N. Y.

John F. Schlosser appeared as attorney for the plaintiff, and Thompson, Weeks & Lown, as attorneys for the defendants, the directors of the National Bank of Fishkill, and Homer A. Nelson, esq., attorney for the defendant Henry Bostwick, receiver, and The National Bank of
19 Fishkill, who demanded copies of the complaint, which were duly served.

Complaint.

Supreme court, county of Dutchess.

THEODORE BRINCKERHOFF, suing on his own behalf and for the benefit of all the other stockholders of The National Bank of Fishkill,

against

HENRY BOSTWICK, as receiver of the National Bank of Fishkill, The National Bank of Fishkill, Lewis H. White, Lawrence C. Rapelje, Henry Bostwick, Jacob G. Van Wyck, Henry D. Sherwood, Cornelius Remsen, Edmund Luyster, Halsey F. Walcott, Garrett DuBois, Oliver W. Barnes, Samuel Hustis, Osmand M. Baxter, and Joseph Van Voorhis.

The above-named plaintiff complains of the above-named defendants, and states—

That The National Bank of Fishkill is, and ever since on or about the 1st day of April, 1865, has been a corporation, duly organized under and by virtue of the act of Congress of the United States of America entitled "An act to provide a national currency, secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof," approved June 3d, 1864, and the acts amendatory thereof, and located and doing business in the village of Fishkill, county of Dutchess, State of New York.

That the defendants, Lewis H. White, Lawrence C. Rapelje, Henry Bostwick, Jacob G. Van Wyck, Henry D. Sherwood, Cornelius Remsen, Edmund Luyster, Halsey F. Walcott, Garrett DuBois, Oliver W. Barnes, Samuel Hustis, Osmand M. Baxter, and Joseph Van Voorhis, were duly elected directors of the said bank in the year 1866, and immediately after their election each of them accepted the said office and trust, and took and filed the oath required by the aforesaid act of Congress, and thereupon each of said persons took upon himself the duties and responsibilities pertaining to the office of a director of the said bank.

That from year to year, from the time of their said first election down to the time of the failure of the said bank and the appointment of a receiver thereof, as hereinafter mentioned, the said persons were duly and regularly elected directors of the said bank, and took and filed the official oath as such directors, and acted and served as directors of the said bank, and caused themselves to be paid for said services out of the moneys of said bank; that their successors have never been elected or appointed, and that they are still the directors of said bank.

The plaintiff further states that the capital of the said bank was two hundred thousand dollars, and was divided into two thousand shares of one hundred dollars each; that the plaintiff, during the continuance of said bank and while the defendants hereinbefore named were the directors thereof, and before the failure of said bank and the appointment of a receiver as hereinafter stated, became and still is the owner of sixteen

shares of the said capital stock of said bank; that the plaintiff became and continued to be such owner of such shares, relying upon the fact that the aforesaid persons were such directors, and upon the truth of certain statements and reports of the financial condition of said bank, made and published by said directors and signed by them, or some of them, which reports and statements were made and published quarter yearly, or thereabouts, from the time of the organization of the said bank up to the time of its passing into the hands of a receiver, as hereinafter mentioned.

21 That it was stated in and by said reports and statements, in substance, that the capital of the said bank remained unimpaired, and that the said bank, in addition to its capital, owned and had a large surplus over and above the payment of its debts and liabilities, and was in a sound and solvent condition.

Whereas, in truth and in fact, the said bank had no surplus and no capital remaining after the payments of its debts, but was insolvent at the time of making and publishing said reports, to the knowledge of said directors, but of which the plaintiff was ignorant. The plaintiff further states that it was the duty of the said defendants as such directors honestly, diligently, and carefully to administer the affairs of the said bank, to employ none but honest and competent persons to serve as officers of said bank; to take from all persons so employed sufficient security for the faithful performance of their duty; to keep honest, accurate, and correct books of account of all the affairs, business, and transactions of the said bank; to see that the property and effects of the said bank were not wasted, stolen, or squandered; not to permit the accounts of depositors or others with the said bank to be overdrawn; to make and publish true and accurate accounts and statements of the affairs of the said bank from time to time as required by the said act of Congress, and to faithfully and diligently perform all other duties devolving upon them as directors of said bank.

The plaintiff further states that the said defendants, directors as aforesaid, utterly failed and neglected to perform their official duties as such directors; they did not give their care and oversight to the business and affairs of said bank, but utterly neglected the same.

They did not administer the affairs of the said bank in an honest, careful, and prudent manner, but on the contrary they negligently

22 suffered and permitted the money, property, and effects of the said bank to be stolen, wasted, and squandered.

They did not keep, nor cause to be kept, correct books of account of the business and transactions of the said bank, but on the contrary they negligently suffered and permitted the accounts of said bank to be falsified by false and deceptive entries.

They negligently suffered and permitted various persons and corporations who were insolvent and irresponsible to overdraw their accounts at said bank to a large amount, without security of any description, whereby large sums of money were lost by said bank.

They negligently suffered and permitted the moneys of the said bank to be loaned to irresponsible persons and corporations without adequate security, by means whereof the said moneys were lost by said bank.

They did not employ honest and competent persons as officers of the said bank, but on the contrary they employed and kept in office as cashier

of said bank a person who was dishonest and unfaithful in the discharge of his duties as such cashier, and who was also incompetent to discharge such duties properly and efficiently, all of which was well known to said directors.

They neglected to take and keep good sufficient security for the faithful performance of his duties by said cashier.

They neglected to take and keep sufficient security for the faithful performance of the duties by the president, teller, and other officers of the said bank.

The said directors did not make honest, accurate, and truthful reports of the affairs of the said bank, but on the contrary they made false, fraudulent, and deceptive reports, and caused the same to be published, and they so negligently and carelessly conducted the said bank and
23 the business and affairs thereof that the entire capital, surplus property, and effects of the said bank were lost, and the stock of the said bank rendered worthless, and the stockholders of the said bank rendered liable for a large and considerable sum of money on account of the debts of the said bank remaining unpaid.

The plaintiff further states that by reason of the negligence and misconduct of the said directors, as hereinbefore stated and set forth, this plaintiff has sustained damages to the amount of three thousand two hundred dollars, and each of the stockholders of said bank has sustained damages to the amount equal to double the par value of the shares of the stock owned by them respectively.

The plaintiff further states that in the month of January, in the year 1877, the said National Bank of Fishkill having failed to redeem its circulating notes, the Comptroller of the Currency being satisfied that said bank had refused to pay its circulating notes and was in default, did appoint the defendant, Henry Bostwick, as receiver of the said bank, pursuant to the provisions of the "act of Congress in such case made and provided," and the said Henry Bostwick having given the security required of him, did enter upon his duties as such receiver, and has ever since acted and still continues to act and serve as receiver of the said National Bank of Fishkill.

The plaintiff further states that before the commencement of this action the plaintiff requested and demanded of the said Henry Bostwick, as such receiver, that he should commence and prosecute an action against the aforesaid directors of the National Bank of Fishkill to recover against them the damages which the said bank or the stockholders thereof have sustained by reason of the negligence and official misconduct of the said directors; that the said receiver neglected and refused to commence such action or any action against the said directors or any or either of them.

24 That said Henry Bostwick is himself one of the directors of said bank, and that this action is commenced and prosecuted by this plaintiff on his own behalf and on behalf and for the benefit of all the other stockholders of said bank.

The plaintiff therefore demands judgment that the damages which the National Bank of Fishkill and the stockholders thereof have sustained by reason of the matters and things heretofore stated and set forth may be ascertained and determined, and that the defendants, who were directors of

said bank, may be adjudged to pay such damages, and that the defendant, receiver of said bank, may recover, collect, and receive such damages for the benefit of the creditors and stockholders of said bank, or else that the plaintiff may recover against the defendants, who are and were directors of said bank, the damages sustained by this plaintiff as a stockholder of said bank, as hereinbefore stated, and that the plaintiff may recover his costs of this action, and that the other stockholders of said bank who shall come in and become parties hereto in such manner and upon such terms as this court may direct, may have such judgment and relief herein as they shall be entitled to, and that such other and further judgment may be rendered herein as the nature of the case may require and as shall be lawful and just.

JOHN F. SCHLOSSER,
Plaintiff's Attorney, Fishkill Landing, N. Y.

The following demurrer was thereafter duly served by each of defendants' attorneys:

25 Supreme court, Dutchess County.

THEODORE BRINCKERHOFF, SUING ON HIS OWN behalf and for the benefit of the other stockholders of The National Bank of Fishkill,
against
HENRY BOSTWICK, AS RECEIVER OF THE NATIONAL Bank of Fishkill; The National Bank of Fishkill, Lewis H. White, Henry Bostwick, Jacob G. Van Wyck, Henry D. Sherwood, Cornelius Remsen, Edmund Luyster, impleaded with Lawrence C. Rapelje, and others.

The above-named defendants, by Thompson, Weeks & Lown, and H. A. Nelson, their attorneys, impleaded as aforesaid, demur to the complaint herein and to the causes of action stated therein for the following grounds: That it appears upon the face of the said complaint that the court in which this action is brought has no jurisdiction of the person of the defendants, because by the complaint they are charged with fraud and malfeasance in office as directors of the National Bank of Fishkill, a bank organized under the act of Congress of the United States, by which the funds of said bank has been diminished and lost, and for which a penalty is prescribed against said directors by said act.

Second. That the said court has no jurisdiction of the subject of the action, because it is for an offence charged against said defendants as directors of a national bank chartered under an act of Congress, and for a cause of action and penalty expressly provided for in the United
26 States currency act, and over which the United States courts only have jurisdiction in an action prosecuted by the Comptroller of the Currency.

Third. Also, for that the said Henry Bostwick, as receiver, and the National Bank of Fishkill are improperly joined with the said defendants directors, and that no joint cause of action is alleged against said directors of the said bank and said Henry Bostwick, as receiver thereof.

Fourth. Also, that no joint cause of action is alleged against said directors of the Bank of Fishkill and the said National Bank of Fishkill.

Fifth. Also, that the said plaintiff has not legal capacity to sue, for the reason that under the terms and provisions of the act of Congress of the United States mentioned and referred to in the complaint herein, the suit or prosecution for the alleged causes of action as set forth in the complaint should be brought and prosecuted by the Comptroller of the Currency in his name of office, and conducted by the district attorney of the United States (currency act).

Sixth. Also, for that the said complaint does not state facts sufficient to constitute a cause of action.

Seventh. Also, that it appears that plaintiff assumes to act for other stockholders without authority, and to sue for others not named in said complaint.

Eighth. Also that there are other directors not named as being liable to said plaintiff in said complaint, who were directors in said bank at the time of its failure.

THOMPSON, WEEKS & LOWN,
Attorneys for the Defendants the Directors of the National Bank of Fishkill, 52 Market Street.
HOMER A. NELSON, Esq.,
Attorney for Henry Bostwick, Receiver, and the National Bank of Fishkill, Poughkeepsie, N. Y.

The issue joined in this action was heard at special term, Poughkeepsie, April 24th, 1880, and the following opinion was rendered May 22d, 1880:

27 *Opinion.*

Supreme court.

THEODORE BRINCKERHOFF
against
HENRY BOSTWICK AND OTHERS.

BARNARD, J.:

The plaintiff, as a stockholder in the National Bank of Fishkill, has no cause of action either against the bank or the directors of the bank for losses sustained by reason of the negligent acts or omissions of the directors. The right of action is in the corporation.

Graves vs. George, 69 N. Y. Rep., 154.

If the corporation refuse, then the stockholder may bring his action against the directors, making the bank a party defendant.

The plaintiff in this action seems to support it by an averment that he requested the receiver, Bostwick, to bring the action, and that he refused.

For the purpose of bringing such an action the receiver is not the bank. His powers under the United States currency act are limited.

By section 5334 of the United States Revised Statutes, he is appointed by the Comptroller of the Currency. "Such receiver, under the direction of the Comptroller of the Currency, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it. Such receiver shall pay over all money

so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings." This language, I think, fails to give the receiver
28 power to act on his own responsibility, as being himself the bank, or to commence an action against the directors in the name of the bank for negligent acts without the direction of the Comptroller of the Currency. His powers are restrictive. He is the mere hand of the Comptroller, having power to sue indeed, but under the entire direction of that officer. It is even doubtful if the Comptroller could authorize the receiver to bring an action against the directors for a violation of duty under the national currency act.

By section 5239 of the United States Revised Statutes, it is made a subject for the forfeiture of the charter "If the directors of any national banking association shall knowingly violate or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this act." Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States in a suit brought for that purpose by the Comptroller of the Currency in his own name, before the association shall be declared dissolved. "And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation."

The demurrer of the defendants must therefore be sustained. If the receiver had the power and failed to sue, he must be presumed, in the execution of his duty, to have acted in such refusal under the direction of his superior. If he had no power to sue by direction of the Comptroller, the action fails. If the Comptroller alone has the power to bring the action, then the action must be brought in the United States courts.

29 After this the following judgment and order was entered June 18, 1880, by defendants' attorneys:

Supreme court, Dutchess County.

THEODORE BRINCKERHOFF, SUING ON HIS OWN behalf and for the benefit of all the other stockholders of the National Bank of Fishkill,

against

HENRY BOSTWICK, AS RECEIVER OF THE National Bank of Fishkill, The National Bank of Fishkill, Lewis H. White, Lawrence C. Rapelje, Henry Bostwick, Jacob G. Van Wyck, Henry D. Sherwood, Cornelius Remsen, Edmund Luyster, Halsey F. Walcott, Garrett DuBois, Oliver W. Barnes, Samuel Hustis, Osmand M. Baxter, and Joseph Van Voorhis.

An order having been entered in this action on the 3d day of June, 1880, sustaining the demurrer interposed by the defendants, and directing that the defendants have judgment thereon:

Now, on motion of Thompson, Weeks & Lown, attorneys for the said

defendants, it is ordered and adjudged that the complaint herein be, and the same is hereby, dismissed, and that the defendants herein recover of the plaintiff the sum of $, their costs and disbursements herein.

Dated June 18, 1880.

On July 24, 1880, the clerk of the court inserted in above judgment the amount of costs and additional allowance, to wit, $247.12.

30 At a special term of the supreme court, held at the court-house in the city of Poughkeepsie, on the 3d day of June, 1880.

Present, Hon. Joseph F. Barnard, justice.

Supreme court, Dutchess County.

THEODORE BRINCKERHOFF, SUING ON HIS OWN behalf and for the benefit of all the other stockholders of the National Bank of Fishkill,

against

HENRY BOSTWICK, AS RECEIVER OF THE NATIONAL Bank of Fishkill, The National Bank of Fishkill, Lewis H. White, Lawrence C. Rapelje, Henry Bostwick, Jacob G. Van Wyck, Henry D. Sherwood, Cornelius Remsen, Edmund Luyster, Halsey F. Walcott, Garrett DuBois, Oliver W. Barnes, Samuel Hustis, Osmand M. Baxter, and Joseph Van Voorhis.

This action having been brought to trial on the issue of law joined herein, after hearing John Thompson in support of the demurrer and John F. Schlosser and E. A. Brewster in opposition:

Ordered that said demurrer be sustained, and that defendants have judgment thereon with costs.

Enter.

J. F. BARNARD.

31 The plaintiff's attorney then duly served the following bill of exceptions:

Supreme court, Dutchess County.

THEODORE BRICKERHOFF, SUING ON HIS OWN BEHALF and for the benefit of all the other stockholders of The National Bank of Fishkill,

against

HENRY BOSTWICK, AS RECEIVER OF THE NATIONAL Bank of Fishkill, The National Bank of Fishkill, Lewis H. White, Lawrence C. Rapelje, Henry Bostwick, Jacob G. Van Wyck, Henry D. Sherwood, Cornelius Remsen, Edmund Luyster, Halsey F. Wolcott, Garrett DuBois, Oliver W. Barnes, Samuel Hustis, Osmand M. Baxter, and Joseph Van Voorhis.

Take notice that the plaintiff excepts to the conclusions of law as found

herein by the court, sustaining the defendants' demurrer and ordering judgment for the defendants with costs.

July 29, 1880.

JOHN F. SCHLOSSER,
Plaintiff's Attorney, Fishkill Landing, N. Y.

To THOMPSON, WEEKS & LOWN,
Attorneys for Certain Defendants.
And HOMER A. NELSON, Esq.,
Attorney for Certain Defendants.

32 Defendants' attorneys applied for an additional allowance, and following order was entered July 10, 1880.

At a special term of the supreme court, held at the court-house in the city of Poughkeepsie, on the 10th day of July, 1880.

Present, Hon. J. F. Barnard, justice.

Supreme court, Dutchess County.

THEODORE BRINCKERHOFF, &c.,
against
HENRY BOSTWICK, AS RECEIVER, ET AL.

On reading and filing the annexed affidavit, and hearing counsel for plaintiff and defendants:

Ordered that the motion be denied without costs, with leave to the moving party to renew the motion.

Enter.

J. F. BARNARD.

Plaintiff's attorney duly served the following notice of appeal July 9th, 1880.

33 Supreme court, Dutchess County.

THEODORE BRINCKERHOFF, SUING ON HIS OWN behalf and for the benefit of all the other stockholders of the National Bank of Fishkill,
against
HENRY BOSTWICK, AS RECEIVER OF THE National Bank of Fishkill, the National Bank of Fishkill, Lewis H. White, Lawrence C. Rapelje, Henry Bostwick, Jacob G. Van Wyck, Henry D. Sherwood, Cornelius Remsen, Edmund Luyster, Halsey F. Walcott, Garrett DuBois, Oliver W. Barnes, Samuel Hustis, Osmand M. Baxter, and Joseph Van Voorhis.

Take notice that the plaintiff hereby appeals to the general term of this court, from the judgment entered in this action, in the office of the clerk of Dutchess County, on the 18th day of June, 1880, in favor of defendants, and dismissing the complaint with costs.

Also, take notice, that upon such appeal the plaintiff also intends to bring up for review the interlocutory judgment or intermediate order made in this action, on the 3d day of June, 1880, and entered in the office of the clerk of Dutchess County, sustaining the demurrer to the complaint, and ordering judgment therein in favor of the defendants.

Dated July 7th, 1880.

JOHN F. SCHLOSSER,
Plaintiff's Attorney.

34 To WILSON B. SHELDON, Esq.,
Dutchess County Clerk.
And THOMPSON, WEEKS & LOWN,
Attorneys for Certain Defendants.
And HOMER A. NELSON, Esq.,
Attorney for Certain Defendants.

The defendants' attorneys then renewed the motion for additional allowance, upon the following affidavit:

Supreme court.

THEODORE BRINCKERHOFF
against
HENRY BOSTWICK, AS REC'R, ET AL.

COUNTY OF DUTCHESS, *ss:*

Frank B. Lown, being duly sworn, says that he is one of the attorneys for the defendants herein. That a demurrer was interposed to the complaint herein, and that the matter was brought to trial before Justice Barnard, at special term, and such proceedings were further had, that on the 3d day of June, 1880, an order was duly entered sustaining said demurrer, and ordering judgment thereon with costs.

That the action is, in the judgment of this deponent, a difficult and extraordinary one, and involved large labor and research on the part of the attorneys for the defendants, and the preparation for the aforesaid trial.

FRANK B. LOWN.

Sworn to before me July 10, 1880.

H. W. GILBERT,
Notary Public.

35 The motion for additional allowance heard at special term July 24th, at which time the following affidavit was made and filed by plaintiff's attorney:

Supreme court.

THEODORE BRINCKERHOFF, &C.,
against
HENRY BOSTWICK, RECEIVER, &C., AND OTHERS.

DUTCHESS COUNTY, *ss:*

John F. Schlosser, of Fishkill, being duly sworn, deposes and says, that

he is the attorney for plaintiff in this action; that final judgment in favor of defendants against plaintiff was entered in Dutchess County clerk's office on June 18, 1880.

That a notice of motion was thereafter served on deponent by defendants' attorney for an extra allowance. Such motion was heard on July 3d, 1880, and was denied, with leave to renew thereafter, and on July 9th, 1880, an appeal from said judgment was taken and perfected by the plaintiff, the notice of appeal having been served on defendants' attorney and on the clerk on July 9, 1880. After such notice of appeal a new notice of motion for an extra allowance (being the present motion) was served on deponent. That the present motion is based on an affidavit which is the same in its statement as that on which the original motion was based, no new or different fact being stated therein.

JOHN F. SCHLOSSER.

Sworn to before me, July 24, 1880.

ALLISON BUTTS,
Notary Public.

36 The following affidavit was made and filed by defendants' attorneys:

Supreme court Dutchess County.

THEODORE BRINCKERHOFF, &c., }
against
HENRY BOSTWICK, AS REC'R, &C., ET AL. }

COUNTY OF DUTCHESS, *ss:*

Frank B. Lown being duly sworn, says that he is one of the attorneys for the defendants herein.

That prior to the entry of the judgment entered herein in favor of the defendants on the 18th day of June, 1880, this deponent, at his office in the city of Poughkeepsie, had a conversation with John F. Schlosser, the attorney for the plaintiff.

That in said conversation with said Schlosser, the latter urged the speedy entry of the judgment in question, in order that he might appeal from it, and that said Schlosser then agreed that judgment might be entered by the defendants, with the right afterwards to have the costs taxed and inserted, and to afterwards move for an additional allowance.

FRANK B. LOWN.

Sworn to before me, July 24, 1880.

H. W. GILBERT,
Notary Public.

37 After this the following order was made and entered July 24th, 1880:

At a special term of the supreme court held at the court-house in Poughkeepsie on the 24th day of July, 1880.

Present, Hon. Joseph F. Barnard, justice.

THEODORE BRINCKERHOFF, &c.,
against
HENRY BOSTWICK, AS RECEIVER, ET AL.

On reading and filing the annexed affidavits, and after hearing John Thompson, of counsel for def'ts, and John F. Schlosser and E. A. Brewster, of counsel for plaintiff,

Ordered that the defendants, appearing by Thompson, Weeks & Lown, have an allowance of $200 in addition to their taxed costs herein. That the judgment heretofore entered herein be opened for the sole purpose of inserting therein the costs as taxed, including said additional allowance; that the appeal heretofore taken by the plaintiff be not affected or prejudiced thereby, and that the notice of appeal heretofore served be amended so as to appeal from this order as an intermediate order, if desired.

Enter.

(Signed) J. F. BARNARD.

38 The plaintiff's attorney thereafter duly served the following amended notice of appeal Aug. 4th, 1880:

Supreme court, Dutchess County.

THEODORE BRINCKERHOFF, SUING ON HIS OWN behalf and for the benefit of all the other stockholders of the National Bank of Fishkill,
against
HENRY BOSTWICK, AS RECEIVER OF THE National Bank of Fishkill; The National Bank of Fishkill, Lewis H. White, Lawrence C. Rapelje, Henry Bostwick, Jacob G. Van Wyck, Henry D. Sherwood, Cornelius Remsen, Edmund Luyster, Halsey F. Walcott, Garrett Du Bois, Oliver W. Barnes, Samuel Hustis, Osmand M. Baxter, and Joseph Van Voorhis.

Take notice that the plaintiff hereby appeals to the general term of this court from the judgment entered in this action in the office of the clerk of Dutchess County, on the 18th day of June, 1880, in favor of defendants, dismissing the plaintiff's complaint with costs.

Also take notice that upon such appeal the plaintiff also intends to bring up for review the interlocutory judgment or intermediate order made in this action on the 3d day of June, 1880, and entered in the office of the clerk of Dutchess County, sustaining the demurrer to the complaint, and ordering judgment therein in favor of the defendants.

Also take notice that upon such appeal the plaintiff also intends to bring up for review the order, or intermediate order, made herein on the
39 24th day of July, 1880, and entered in the Dutchess County clerk's

office, granting an allowance of $200 in addition to the taxed costs herein to the defendants.

Dated July 29, 1880.

JOHN F. SCHLOSSER,
Plaintiff's Attorney.

To WILSON B. SHELDON, Esq.,
Dutchess County Clerk,
And THOMPSON, WEEKS & LOWN,
Attorneys for Certain Defendants.
And HOMER A. NELSON, Esq.,
Attorney for Certain Defendants.

40 At a general term of the supreme court, held in and for the second judicial department, at the court house, in the city of Brooklyn, on the fourteenth day of December, 1880.

Present, Hon. Jasper W. Gilbert, Hon. Jackson O. Dykeman, justices.

THEODORE BRINKERHOFF
vs.
HENRY BOSTWICK, RECEIVER, &c.

We appeal from the judgment and order granting extra allowances entered herein having heretofore been brought on for argument before this court.

Now, after hearing counsel for the respective parties, and due deliberation having been had thereon, it is ordered that the said judgment and order be, and the same hereby are, affirmed with costs.

Opinion by Justice Gilbert.

Justice Barnard not sitting.

An extract from the minutes.

CHAS. B. ELLIOTT, *Clk.*

41 Supreme court, county of Dutchess.

THEODORE BRINKERHOOF, SUING IN HIS OWN behalf, and for the benefit of all the other stockholders of the National Bank of Fishkill,
ag't
HENRY BOSTWICK, AS RECEIVER OF THE NATIONAL Bank of Fishkill, The National Bank of Fishkill, Lewis H. White, Lawrence C. Rapelje, Henry Bostwick, Jacob G. Van Wyck, Henry D. Sherwood, Cornelius Remsen, Edmund Luyster, Halsey F. Walcott, Garrett Dubois, Oliver W. Barnes, Samuel Hustis, Osmund N. Baxter, & Joseph Van Voorhis.

The appeal from the judgment and order herein, having been argued before the general term of this court, and the said court having made & filed its decision, affirming said judgment and order with costs:

Now, on motion of Thompson, Weeks & Lown, att'ys for the defendants Bostwick, Van Wyck, Luyster, Remsen, Sherwood, and White, it is adjudged that said judgment and order appealed from be affirmed, & that said last named defendants recover of the plaintiff & appellant the sum of $106.49, being the costs and disbursements of appeal as adjusted.

42 W. B. SHELDON, *Clerk.*

To JNO. F. SCHLOSSER, *Pl'ff's att'y.*

Take notice that the within is a copy of a judgment this day entered in Dutchess County clerk's office.

THOMPSON, WEEKS & LOWN,
Att'ys for Def'ts.

DEC'R 28TH, 1880.

43 Supreme court, Dutchess County.

THEODORE BRINCKERHOFF, SUING IN HIS OWN behalf, and for the benefit of all the other stockholders of the National Bank of Fishkill,
against
HENRY BOSTWICK AS RECEIVER OF THE National Bank of Fishkill, The National Bank of Fishkill, Lewis H. White, Lawrence C. Rapelje, Henry Bostwick, Jacob G. Van Wyck, Henry D. Sherwood, Cornelius Remsen, Edmund Luyster, Halsey F. Walcott, Garrett Dubois, Oliver W. Barnes, Samuel Hustis, Osmond M. Baxter, and Joseph Van Voorhis.

Take notice, that the plaintiff hereby appeals to the court of appeals from the judgment entered in Dutchess County clerk's office herein upon the decision of the general term of the supreme court on the 28th day of December, 1880, for one hundred six $\frac{49}{100}$ dollars, costs, and affirming the judgment entered in this action on the 18th day of June, 1880, in favor of defendants and against plaintiff, with costs.

44 Also take notice, that upon such appeal the plaintiff also intends to bring up for review the interlocutory judgment or intermediate order made in this action on the 3d day of June, 1880, and affirmed by the general term of the supreme court on the 14th day of December, 1880, sustaining the demurrer to plaintiffs' complaint, and ordering judgment therein in favor of the defendants.

JOHN F. SCHLOSSER,
Plaintiff's Att'y, Fishkill Landing, N. Y.

To THOMPSON, WEEKS & LOWN, Esq's.,
Attorneys for certain Defendants.
HOMER A. NELSON, Esq.,
Attorney for certain Defendants, and
WILSON B. SHELDON, Esq.,
Dutchess County Clerk.

STATE OF NEW YORK,
County of Dutchess, ss:

I, Wilson B. Sheldon, clerk of the county of Dutchess, and also clerk of the county court of said county, and of the supreme court of the State of New York in and for said county, the same being courts of record, do hereby certify, that I have compared the preceding copy with the original judgment roll and notice of appeal on file in my office, and that the same is a correct transcript therefrom and of the whole of such original.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said courts and county, the 30th day of Dec., 1880.

[SEAL.] W. B. SHELDON, *Clerk.*

45 Court of appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 7th day of February, in the year of our Lord one thousand eight hundred and eighty-two, before the judges of said court.

Witness the Hon. Charles Andrews, chief judge, presiding.

E. O. PERRIN, *Clerk.*

Remittitur, March 8, 1882.

46 THEODORE BRINCKERHOFF, SUING IN HIS own behalf & for the benefit of all the other stockholders of the National Bank of Fishkill, app'l't,
ag'st
HENRY BOSTWICK, RECEIVER OF THE NATIONAL Bank of Fishkill & o'rs, resp'd'ts.

Be it remembered that on the 31st day of December, in the year of our Lord one thousand eight hundred and eighty, Theodore Brinckerhoff, for himself, &c., the appellant in this action, came here into the court of appeals, by John F. Schlosser, his attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the general term of the supreme court of the State of New York, and Henry Bostwick, receiver, &c., and others, the respondents in said action, afterwards appeared in said court of appeals, by Thompson, Weeks & Lown & Homer A. Nelson, their attorneys.

Which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

47 Whereupon, the said court of appeals, having heard this cause argued by Mr. E. A. Brewster, of counsel for the appellant, and by Mr. John Thompson, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the general term of the supreme court, appealed from in this action, be and the same is hereby reversed and judgment rendered for plaintiff on demurrer with costs, with leave to the defendants to withdraw the demurrer within thirty days, on payment of costs in this court and the supreme court, and to answer the complaint.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

48 Therefore, it is considered that the said judgment be reversed & judgment be rendered for plaintiff on demurrer, with costs, with leave, &c., &c., as aforesaid.

And hereupon, as well as the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are, by the said court of appeals, remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

E. O. PERRIN,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, March 8, 1882.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] E. O. PERRIN, *Clerk.*

49 Court of appeals.

THEODORE BRINCKERHOFF, FOR SELF & OTHER stockholders, &c., appellant,
vs.
HENRY BOSTWICK, AS RECEIVER, & AL., respondent.

RAPALLO, J.

The complaint charges, among other things, that the defendants, Bostwick and others, who were directors of the National Bank of Fishkill, neglected to perform their official duties as such directors, and negligently permitted the money, property, and effects of the bank to be stolen, wasted, and squandered; that they negligently permitted various persons and corporations, who were insolvent and irresponsible, to overdraw their accounts to a large amount without security, and negligently permitted the money of the bank to be loaned to irresponsible persons and corporations

50 without adequate security, whereby said money was lost; that they employed a cashier who was dishonest, unfaithful, and incompetent, all of which was known to them; that they neglected to take and keep good and sufficient security for the performance of the duties of said cashier and of the president and other officers of the bank, and that they so negligently and carelessly conducted its affairs that its entire capital, surplus, property, and effects were lost and the stock rendered worthless, and the stockholders were rendered liable for a large sum of money on account of the unpaid debts of the bank.

The plaintiff avers that he was the holder of sixteen shares of the capital stock, and that by reason of the negligence and misconduct of said

directors he has sustained damage to the amount of $3,200, and each of the stockholders has sustained damages to the amount of double the par value of the stock held by him.

The complaint then sets out the default of the bank in not
51 redeeming its circulating notes, and the appointment by the Comptroller of the Currency, in January, 1877, of the defendant Bostwick as receiver of the bank, pursuant to the provisions of the national banking act; that such receiver duly qualified, and has ever since acted, and still continues to act as such receiver, and that before the commencement of this action the plaintiff requested said receiver to bring an action against the said directors for the damages which the bank or its stockholders had sustained by the negligence and official misconduct of said directors, but that he neglected and refused to bring any action against them, or any of them, and that he himself is one of said directors who are charged with misconduct.

The action is brought by the plaintiff in his own behalf and in behalf of all the other stockholders of the bank, and the judgment demanded is that the damages which the bank and its stockholders have sus-
52 tained may be ascertained, and that the defendants who were directors of the bank may be adjudged to pay such damages, and that the receiver may collect them for the benefit of the creditors and stockholders, or that the plaintiff may recover his damages and costs, and that the other stockholders who may come in may have such judgment as they are entitled to, &c.

The receiver, the bank, and the directors are joined as defendants.

The respondents demurred to the complaint on the ground of want of jurisdiction, improper joinder of parties, want of legal capacity to sue, and failure to show a cause of action.

The supreme court at general term held in favor of the plaintiff on the question of jurisdiction and the sufficiency of the statement of the cause of action, but sustained the demurrer on the ground that the demand upon the receiver and his refusal to bring an action against the delinquent direct-
ors was insufficient to authorize the plaintiff to sue as a stock-
53 holder; that the receiver had no authority to prosecute except under the direction of the Comptroller of the Currency, and that in refusing to bring an action he acted in accordance with his duty, the court at the same time expressing the opinion that an improper refusal of the Comptroller of the Currency to prosecute and to direct the receiver to prosecute would entitle the stockholders to sue in their own behalf, making the corporation a party defendant.

The defendants contend that the Comptroller of the Currency and not the receiver was the proper party to bring the action.

It seems to us that the case must turn upon this question: If the defendants are right in their position that the right of action is in the Comptroller of the Currency, the stockholders, as a matter of course, could not sue except in case of his refusal. But if the receiver represents the bank, and is the proper party to prosecute, then we think enough is shown to justify the stockholders in applying directly to the court for relief.

54 The causes of action set forth in the complaint are losses and misapplication of the funds of the bank through the negligence and misconduct of its directors. For these losses the bank, if still exercising

its corporate functions, would have a claim upon the guilty directors which it could enforce by action; but if it refused to prosecute, or if it still remained under the control of the very directors against whom the action should be brought, the stockholders would have a standing in a court of equity to sue in their own names, making the corporation a party defendant. Robinson vs. Smith, 3 Paige, 222–233; Graves vs. Gouge, 69 N. Y., 154; Ang. & A. on Corp., s. 310. See review of cases in Heath vs. Erie R. way Co., 8 Blatchf., 347–393.

Section 5234 of the U. S. Rev. Stat. provides that, upon the appointment of a receiver by the comptroller, such receiver shall, under the direction of the Comptroller, take possession of the books, &c., of the association, and collect all debts, dues, and claims belonging to it, and pay the money collected by him to the Treasurer of the United States. The receiver is the only person authorized by the act to collect dues and claims belonging to the bank. Whether special instructions from the Comptroller to the receiver are necessary to enable the receiver to collect or sue for each particular claim it is not very material in our view of the case to inquire. It is sufficient for all present purposes to show that no person but the receiver is empowered by the act, or can be directed by the Comptroller to collect claims belonging to the bank. That the claims set out in the complaint belonged to the bank, and could have been enforced by it but for the receivership, is too plain to require argument.

The claim that the right of action was vested in the Comptroller rests wholly upon the provisions of section 5239 of the R. S. of the U. S., whereby it is enacted that: "If the directors of any national banking association shall knowingly violate or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title, all the property, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller f the Currency in his own name, before the association shall be declared dissolved."

And in cases of such violation, "every director who participated in, or assented to, the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation."

These provisions are evidently intended to apply to violations by these corporations of the law under which they are organized, and to subject them to the forfeiture of their corporate franchises upon such violations being established by the judgment of a court of the United States. Being organized under an act of Congress, the jurisdiction to declare a forfeiture of their franchises is very appropriately vested exclusively in the courts of the United States and the Comptroller of the Currency is designated as the officer who shall prosecute for the purpose of having such forfeiture adjudged. It would, of course, be very inappropriate that such a proceeding should be instituted by a receiver, who has only to deal with the assets of the bank, and the requirement that the violation should be adjudged by a court of the United States, at the suit of the Comptroller, is by the terms of the section made essential "before the association shall be declared dissolved," but there is nothing in the act

which renders it essential for any other purpose; and it is further to be observed that this is the only provision of the act which authorizes the Comptroller to institute any action in relation to the affairs of a national bank.

58 The further provision that every director who participates in the violation of the banking act shall be personally liable for damages, does not in terms require that the action for such damages be brought in a court of the United States, nor that it be instituted by the Comptroller, nor do we think that it has reference to such violations by the directors of their duties to the bank as are the subject of this action, but rather to violations of the national banking act, by the assumption of the power in excess of the franchises granted or the disregard of the prohibitions of the act, offences of the character which usually subject a corporation to the forfeiture of its charter. These are offenses committed by the corporation itself, through its directors and officers, against the government by whom its franchises are granted, and very different in their character from breaches of trust by an officer, agent, or trustee of a corporation, for which he is responsible only to the corporation or its shareholders. Even if it

59 should be held that where proceedings for the forfeiture of the franchises of the corporation are instituted by the Comptroller under section 5239, he may also proceed against the directors for damages, it does not follow that where there is no proceeding for forfeiture he is the proper party to proceed against directors or officers for damages for which they are responsible to the corporation. In Kennedy vs. Gibson, 8 Wall., 506, it is said by the Supreme Court that the receiver represents the creditors and the association, and is the proper party to bring suits at law and in equity, and that he may sue in the State courts.

The liability of the directors of corporations for violations of their duty or breaches of the trust committed to them, and the jurisdiction of courts of equity to afford redress to the corporation, and in proper cases to its shareholders for such wrongs, exist independently of any statute. By the revised statutes of N. Y. (2. R. S., 462,) it is declared that the

60 chancellor has jurisdiction over directors, managers, and other trustees and officers of corporations, to compel them to account for their official conduct in the management and disposition of the funds and property committed to their charge, and to compel payment by them to the corporation whom they represent of all sums of money and the value of all property which they may have acquired to themselves or transferred to others, or may have lost or wasted by any violation of their duties as such trustees. These enactments are, however, merely declaratory of a jurisdiction long previously conceded to exist both in this State and in England, and to them were added by further provisions of the R. S. Certain visitorial power not before exercised by the court of chancery (except in cases of charitable bodies), viz: To restrain corporations from exceeding their corporate powers. This latter jurisdiction was that which the court

61 of chancery disclaimed in the well known case of the Att'y General vs. The Utica Ins. Co., 2 Johnson Ch., 389, with reference to which case the provisions of the Revised Statutes just refered to were framed. But in that very case jurisdiction in cases like the present was conceded to be inherent in the court, and in Robinson vs. Smith, 3 Paige, 222–223, the power is declared to exist independently of the provisions of the R. S., so,

far as the individual rights of stockholders are concerned, to call directors to account and make satisfaction for losses occasioned by breaches of their trust. This jurisdiction has been continually exercised in England and in this country, and is not of statutory origin. Angel & Ames on Corp., sec. 312, and cases cited.

The action to recover such losses, as before observed, should in general be brought in the name of the corporation; but if it refuses to prosecute, the stockholders, who are the real parties in interest, will be per-
62 mitted to sue in their own names, making the corporation a defendant. (69 N. Y., 154.) And that course of proceeding is also allowed if it appears that the corporation is still under the control of those who must be made the defendants in the suit. (See Butts vs. Wood, 37 N. Y., 317; Robinson vs. Smith, 3 Paige, 222.) In such cases a demand upon the corporation to bring the suit would be manifestly futile and unnecessary. A suit prosecuted under the direction and control of the very parties against whom the misconduct is alleged and a recovery is sought would scarcely afford to the shareholders the remedy to which they are entitled, and the fact that the delinquent parties are still in control of the corporation is of itself sufficient to entitle the shareholders to sue in their own names. (Hodges vs. New England Screw Co., 1 Rhode I., 2312; Heath vs. Erie Railway Co., 8 Blatchf., 347.) If they could not be permitted in such cases to assert their own rights in a court of equity,
63 the directors, so long as they remained in office could set them at defiance.

In the present case the corporation cannot sue, because all its rights of action have been transferred by operation of law to the receiver. He certainly is not a proper person to whom to intrust the conduct of the action, even did he consent to institute it, or should the Comptroller of the Currency direct him so to do, for he is one of the parties charged with misconduct, and against whom a remedy is sought. It necessarily follows that the shareholders must be permitted to sue in their own names, or the wrongs complained of must go without redress, and substantial rights be sacrificed to a mere matter of form. The stockholders are the parties whose interests are involved in the proceeding. If conducted in the name of the corporation, or the receiver, it would be as their representative, and for their benefit, and when, as in this case, sufficient reasons are shown why it cannot be effectually prosecuted in that form, the right
64 of the shareholders to sue in their own names is sanctioned both by principle and precedent.

Where the shareholders are numerous the suit may be brought by one or more in behalf of all. (Butts vs. Wood, 37 N. Y., 317; Robinson vs. Smith, 3 Paige, 222; Hickens vs. Congreve, 4 Russ.. 562; 8 Blatchf., 347.)

The jurisdiction of the State court to entertain the action is also challenged by the demurrer. The right of action is not, in our opinion, derived from the act of Congress, but depends upon general principles of equity; but in any aspect of the case the State courts have concurrent jurisdiction, unless exclusive jurisdiction has been conferred upon the United States courts. (Claflin vs. Houseman, 3 Otto, 130. Robinson vs. Nat. Bank of Newberne, 81, N. Y. R., 385. National Bank of Gloversville vs. Johnson, 79 N. Y. R., 498, affirmed in the Supreme Court of the U. S. Jan. 7, 1882.) The jurisdiction of the State courts over actions against

national banks is expressly recognized by the act, and such juris-
65 diction has been repeatedly exercised in actions by receivers to collect claims due to such banks. There can be no other reason why civil actions brought by stockholders in place of the receiver to enforce claims against delinquent directors or officers should stand upon any different footing. The only cases in which exclusive jurisdiction is conferred by the banking act upon the courts of the United States, so far as we can find, are proceedings to enforce the forfeiture of the franchises of banking associations for violations of the act (§ 5239), and proceedings to enjoin the Comptroller of the Currency from winding up the corporation through a receiver. There is nothing in the act which withdraws from the jurisdiction of the State courts civil actions to enforce rights of individuals against national banks or their officers. (Cooke vs. State Nat. Bank of Boston, 52 N. Y., 96; Betz vs. Columbia Nat. Bank, 87 Penn. St., 87.) Criminal prosecutions for offences created by the act stand upon a different
66 footing. Exclusive jurisdiction in such cases is vested in the circuit and district courts of the U. S. by the judiciary act of 1789.

The bank was a proper and even a necessary party defendant. (Robinson vs. Smith, 3 Paige, 222.) It continued to be a corporation, notwithstanding the appointment of a receiver; and the receiver may bring actions in its name. (36 Conn., 325; 8 Wall., 506; 7 Hun., 63; 14 Wall., 283; 17 Wall., 19.) The receiver was also a necessary party, as it was through him that the amount which might be adjudged against the directors was to be collected and paid over. The presence of both of these parties was necessary to a final determination of the controversy.

We entertain no doubt of the sufficiency of the allegations of the complaint to constitute a cause of action against the defendants who are sued as directors. The rule of liability in such cases is well stated by Chancellor Walworth in Robinson vs. Smith, 3 Paige, 222: "The di-
67 rectors of a corporation who wilfully abuse their trust or misapply the funds of the company, by which a loss is sustained, are personally liable, as trustees, to make good that loss, and they are also liable if they suffer the corporate funds to be lost or wasted by gross negligence and inattention to the duties of their trust." (See also cases cited in Cumb. Coal Co. vs. Sherman, 30 Barb., 159; Cunningham vs. Pell, 5 Paige, 607, 613.)

The judgment appealed from should be reversed and judgment rendered for the plaintiffs on the demurrer, with costs, with leave to the defendants to withdraw the demurrer within thirty days, on payment of costs in this court and in the supreme court, and to answer the complaint.

All concur.

A copy.

H. E. SICKELS, *Reporter*,
Per C.

(Indorsed:) Brinckerhoff ag'st Bostwick. Opinion. Rapallo, J.

(Indorsement on cover:) No. 837. Henry Bostwick, as receiver of the National Bank of Fishkill, The National Bank of Fishkill, Lewis H. White, Henry Bostwick et al., directors of the National Bank of Fishkill, plaintiffs in error, vs. Theodore Brinckerhoff, suing in his own behalf and for the benefit of the other stockholders of the National Bank of Fishkill. New York court of appeals. Filed 10th May, 1882.

16-3

United States Supreme Court.

HENRY BOSTWICK,
Receiver of the National Bank of Fishkill, &c.,
Plaintiffs in error,

Against

THEODORE BRINCKERHOFF,
Suing on his own behalf, &c.,
Defendant in error.

NOTICE OF MOTION TO DISMISS.

J. HERVEY COOK,
Attorney for Defendant in error,
Fishkill Landing,
N. Y.

Supreme Court United States.

HENRY BOSTWICK as Receiver of the National Bank of Fishkill, The National Bank of Fishkill, Lewis H. White, Henry Bostwick, Lawrence C. Rapelje, Jacob G. Van Wyck, Henry D. Sherwood, Cornelius Remsen, Edmund Luyster, Halsey F. Walcott, Garrett DuBois, Oliver W. Barnes, Samuel Hustis, Osmand M. Baxter, and Joseph Van Voorhis,

Plaintiffs in error,

against

THEODORE BRINCKERHOFF, suing on his own behalf and for the benefit of all the other stockholders of the National Bank of Fishkill,

Defendant in error.

Take notice that upon the writ of error and return thereto forming the record in this case a motion will be made at this court at a term thereof to be held at the Capitol in the city of Washington, D. C., on the ninth day of October next at the opening of the Court on that day, or as soon thereafter as Counsel can be heard, that the writ of error in this case be quashed and dismissed with costs, upon the ground that the Court has no jurisdiction of this case, and in case the Court decides that the record shows that this Court has jurisdiction a motion will be made at the same time and place to affirm the judgment in this case on the ground that it is manifest that the said writ of error was taken for delay only and that the question on which jurisdiction depends is so frivolous as not to need further argument; and for such further order and relief as may be lawful and proper.

Dated July 24, 1882.

Yours &c.,

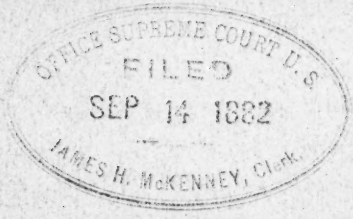
J. HERVEY COOK,

Attorney for Defendant in error,

Fishkill Landing,

N. Y.

16-3



IN THE

Supreme Court of the United States.

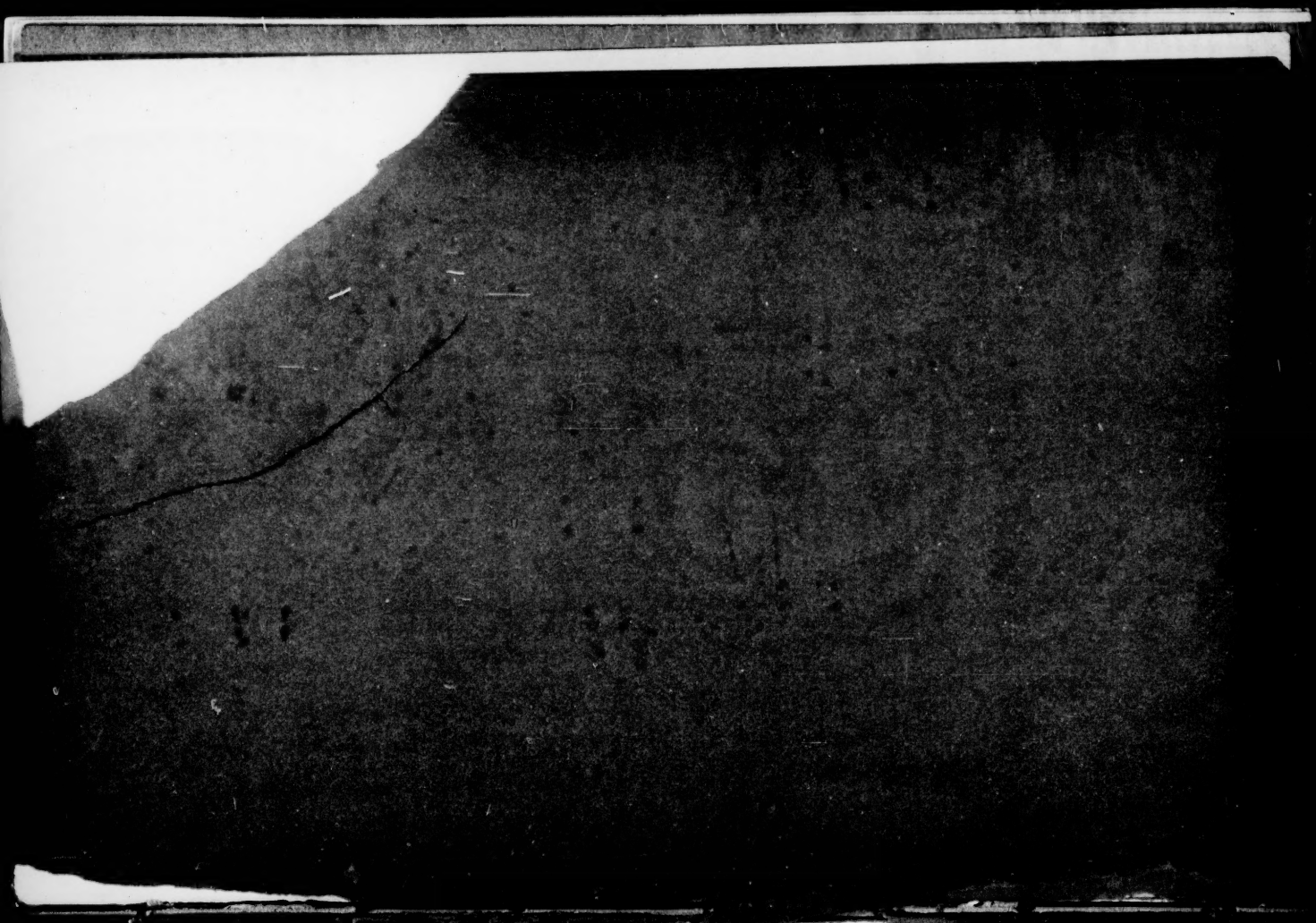
HENRY BOSTWICK,
Receiver of the National Bank of Fishkill, &c.,

Against

THEODORE BRINCKERHOFF,
Suing on his own behalf, &c.

NO. 837.

DEFENDANT IN ERROR'S BRIEF IN SUPPORT OF MOTION TO DISMISS.



IN THE

Supreme Court of the United States.

HENRY BOSTWICK and Others,
Plaintiffs in Error,

against

THEODORE BRINCKERHOFF,
Defendant in Error.

No. 837.

Motion to dismiss a writ of error to the Court of Appeals of the State of New York, or for judgment of affirmance under subdivision 3 of Rule 6.

Brief for defendant in error in support of the motion.

STATEMENT.

The action was brought in the Supreme Court of the State of New York, by the present defendant in error, as stockholder of a National Bank, against the present plain-

tiffs in error, who are the directors of such bank, to recover damages sustained in consequence of the neglect and violation of their official duties and obligations by such directors.

The defendants in the Court below demurred to the complaint upon the ground: 1st. That the State Court had no jurisdiction of the subject matter of the action; 2d. That the complaint does not state a cause of action.

The Supreme Court, at Special and General Terms, sustained the demurrer and ordered judgment for the defendants in the Court below.

From such judgment the plaintiff in the Court below appealed to the Court of Appeals; which Court reversed the judgment of the Supreme Court and ordered judgment for the plaintiff in the Court below, with leave for the defendant in the Court below to withdraw the demurrer and answer the complaint within thirty days, on payment of costs; and remanded the case to the Supreme Court.

Before the judgment of the Court of Appeals had been remitted to the Supreme Court, the defendants in the Court below brought a writ of error to this Court.

The plaintiff in the Court below being the defendant in error in this Court, now moves to dismiss such writ of error on the following

POINTS.

I.

The judgment of the Court of Appeals is not a "*final judgment*" within the meaning of the statute concerning the review of judgments and decrees of State Courts on a writ of error. The statute is as follows (U. S. Rev. Stat., Section 709):

> "A final judgment or decree in any suit in the highest Court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute or any authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party, under such Constitution, treaty, statute, commission or authority, may be re-examined and reversed or affirmed by the Supreme Court, upon a writ of error."

The judgment in question in this case was not final, because it expressly gave the defeated party the right to answer the complaint on payment of costs, within thirty days.

The term of thirty days would not begin to run until the filing of the remititur from the Court of Appeals, in the Supreme Court; consequently if this Court should affirm the decision of the Court of Appeals, the judgment would not terminate the action, as the plaintiffs in error would still have the right to put in their answer and have a trial upon the merits. The defendants below should have put in their answer and gone to trial on the merits, and then if they were beaten, they could have appealed, and if the judgment against them was affirmed by the Court of Appeals, they could have brought a writ of error to this Court, provided the case in other respects comes within the requirements of the statute above cited.

The decisions of this Court defining a "final judgment" fully sustain the position that the judgment in question was not "final."

A judgment to be final must finally decide and dispose of the whole merits of the cause, so that it will not be necessary to bring the cause again before the Court.

Beebe et al. vs. Russell, 19 Howard, 283.
Farrely vs. Woodfolk, id. 288.
Mordecai vs. Lindsay, id. 199.

A decree overruling a plea and directing the defendant to answer is not a final judgment.

Rutherford vs. Fisher, 4 Dallas, 22.

A judgment of the highest Court of a State, reversing the judgment of an inferior Court and ordering a new trial or remanding the case for further proceedings, is not a "final judgment" in the sense in which that term is used in the statute concerning writs of error.

Houston vs. Moore, 3 Wheaton, 433.
Brown vs. Bank of Florida, 4 Howard, 465.
Pepper vs. Dunlap, 5 Howard, 51.
Tracy vs. Holcombe, 24 Howard, 426.
Parcels vs. Johnson, 20 Wallace, 653.
Davis vs. Cranch, 94 U. S., 514.

"Until the parties have exhausted the powers of the State Court in the premises, the powers of this Court cannot be called into action."

Parcels vs. Johnson, supra.

The judgment of the highest State Court, reversing a judgment of an inferior Court sustaining a demurrer and permitting the party to plead or amend, is not final and cannot be removed by writ of error into this Court.

McComb, executor, &c., vs. Com. of Knox Co., 91 U. S., 1.

II.

A writ of error was not authorized in this case because no question arose concerning the validity of any treaty or statute of, or authority exercised under the United States; nor was there drawn in question the validity of any statute of, or authority exercised under any State, on the ground of repugnancy to the Constitution, treaties, or laws of the United States; nor was any title, right, privilege or immunity claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States.

The action was not based on the violation of the National Banking Act by the directors.

The theory of this action was that the directors were trustees for the stockholders, and as trustees were answerable for the violation of their duties as trustees, in a Court of Equity, under the well recognized rule that Courts of Equity have general jurisdiction over trust and trustees.

The decision of the Court of Appeals rests upon this common law relation of trustee and *cestui que* trust between the directors and stockholder.

Robinson vs. Smith, 3 Paige, R. 233.

The relation once established or conceded, the correlative obligation of faithfulness on the part of the trustee,

and the remedy in favor of the injured stockholder, all follow as of course. No statutory provision was or had need to be invoked.

III.

If jurisdiction were conceded, the questions raised by the Plaintiffs in error, are manifestly frivolous.

The State Court had jurisdiction of the subject matter of this action.

If the right of action exists at common law, of course the state court had jurisdiction. Even if the right of action depends upon the act of Congress, the rule is now well settled that the state courts have concurrent jurisdiction with the federal courts in all cases arising under acts of Congress, except where it is expressly prohibited.

Claflin vs. Houseman, 3 Otto, 130.

Section 5239 of Rev. Stat. U. S. does not give to the United States Courts exclusive jurisdiction of actions against delinquent directors of National Banks to recover damages sustained by the association or its shareholders.

It is only "in proceedings brought by the Comptroller *to forfeit the franchises of a bank*," because of a violation of the act by the directors, that such exclusive jurisdiction exists.

The section in question, although it declares the directors responsible for the damages the shareholders shall sustain by their misconduct, does not specify the tribunal in which such damages are recoverable, and consequently the state courts are not deprived of their jurisdiction.

The entire section is as follows:

> "If the directors of any national banking association "shall knowingly violate or knowingly permit any of "the officers, agents, or servants of the association "to violate any of the provisions of this title, all "the property, privileges and franchises of the as- "sociation shall be thereby forfeited. Such violation "shall, however, be determined and adjudged by a "proper circuit, district, or territorial court of the "United States, in a suit brought for that purpose "by the Comptroller of the Currency, in his own "name, *before the association shall be declared dissolv- "ed.*
>
> "And in cases of such violation every director who "participated in or assented to the same, shall be held "liable in his personal and individual capacity for all "damages which the association, its shareholders, or "any other person shall have sustained in consequence "of such violation."

It will be seen that the violation of their duties by the directors, produces two effects:

First. The forfeiture of the franchise.

Second. Liability of the directors in damages to those who are injured by their acts.

It is for the first only (the forfeiture of the franchise) that the Comptroller must sue. The damages sustained are left to be sued for by those who have sustained them, without any restriction as to the court in which such suits shall be brought. It is not probable that Congress intended to give to the Comptroller exclusive right to sue for the damages sustained not only by the association, but by its shareholders or any other person. The person who sustains the damage is the one to sue for redress or indemnity.

This is not only the obvious reading of the section, but it is in harmony with the other parts of the banking act.

There are but two cases under the act in which the Federal Courts have exclusive jurisdiction, and both have reference to the forfeiting of the corporate franchise.

One is the case where for a violation of the act by the directors the Comptroller can sue in the United States Court only, to have the franchise declared forfeited.

The other case (Sec. 5237) is where it being alleged that the bank has failed to redeem its circulating notes, the Comptroller may of his own motion, without notice to the bank, appoint a Receiver to close up the corpora-

tion. But in that case (in order that the bank may not be without redress in case of a wrong exercise of this power by the Comptroller) the bank may apply to the United States Circuit Court to enjoin the Comptroller.

In these two cases only does the banking act give exclusive jurisdiction to the Federal Courts. In all cases in which civil rights and obligations are to be enforced in favor of individuals against National Banks or their officers, the party aggrieved is left at liberty to proceed in the ordinary way in the state courts.

Bletz vs. Columbia National Bank, 87 Penn. St. 87, (or 30 Am. R. 343.)

IV.

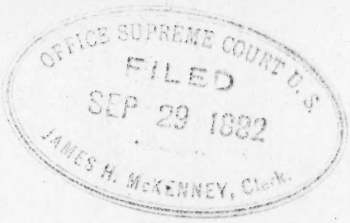
The writ of error should be dismissed for want of jurisdiction, or else the judgment should be affirmed on the ground that the questions raised by the plaintiffs in error, are so manifestly frivolous as to require no further argument.

J. HERVEY COOK,

Of Counsel for defendant in error,

Fishkill Landing, N. Y.

16-3



Supreme Court of the United States.

HENRY BOSTWICK, as Receiver of the National Bank of Fishkill, and others, plaintiffs in error.

vs.

THEODORE BRINCKERHOFF, Defendant in error.

Brief for Plaintiffs in error to oppose motion to dismiss Writ of Error.

E. L. FANCHER,
Attorney and Counsel for Plaintiffs in error,
229 *Broadway, New York.*

NEWBURGH JOURNAL PRINTING HOUSE AND BOOK-BINDERY,
Nos. 44 and 46 Second Street, Newburgh, N. Y.

Supreme Court of the United States.

HENRY BOSTWICK, as Receiver of the National Bank of Fishkill, and others, plaintiffs in error,

vs.

THEODORE BRINCKERHOFF, Defendant in error.

Brief of plaintiffs in error, in opposition to motion to quash or dismiss the writ of error.

I

Statement of the Case.

This case is brought to this court by writ of error to the Court of Appeals of the State of New York.

The action was commenced in the Supreme Court of New York by the defendant in error, as a stockholder of the National Bank of Fishkill, on behalf of himself and all other stockholders, against the directors of the bank, the bank itself, and the Receiver appointed by the Comptroller of the Currency.

The complaint charges the directors with violating certain provisions of the National Currency Act, in neglecting and violating their official duties; in making false and fraudulent reports; in appointing incompetent and dishonest officers; in not taking security for the faithful performance of their duties from the officers of the bank; in permitting overdrafts of large amounts without security; in loaning the money of the bank to irresponsible per-

sons without security, and permitting the money and property of the bank to be stolen and wasted, whereby the stock of the bank is rendered worthless and the stockholders rendered liable to an assessment for an amount equal to the amount of the stock.

The complaint also alleges the failure of the bank to redeem its circulating notes, and the appointment by the Comptroller of the defendant therein, Henry Bostwick, as Receiver; also, that before the commencement of the action the plaintiff therein demanded of the Receiver that he bring an action against the directors for the causes aforesaid, which demand the Receiver refused to comply with; and further, that those sued in the action as directors, are still the directors of said bank, and Bostwick, the Receiver, is also one of such directors.

The complaint demands judgment in favor of the plaintiff therein, against the directors for double the value of his stock; or, that the Receiver recover the damages sustained by all the stockholders, and apply such damages for their benefit in relieving them from liability and loss.

All the defendants therein demurred to the complaint on the grounds:

First. Want of jurisdiction of the State Court.

Second. Misjoinder of parties, because the Receiver and the bank are made co-defendants with the directors; and

Third. That the complaint does not state a cause of action.

The demurrer was sustained in the Supreme Court of New York, but on appeal to the Court of Appeals the judgment was reversed, and judgment rendered for the plaintiff in the action on the demurrer, with costs, with leave to the defendants therein to withdraw the demurrer within thirty days on payment of costs, and to answer the complaint.

The defendants (plaintiffs in error in this Court) sued out a Writ of Error from the Supreme Court of the United States.

The opinion of the Court of Appeals was delivered by Rapallo, J. (Fol.)

II.

Assignment of Errors.

The plaintiffs in error assert the following errors:

It was error for the New York Court of Appeals to hold,

1. That the State Court had jurisdiction of the action;

2. That the defendants in the action (one of whom, *i. e.* the Receiver, was an officer of the United States,) were properly joined and could be made liable therein for the damages claimed, at common law, irrespective of the provisions of the National Banking Act;

3. That the action could be maintained by a stockholder of the Bank, without any application to the Comptroller of the Currency, or any direction or control of that officer;

4. That there was no provision in the National Banking Act giving the Federal courts exclusive jurisdiction of suits against bank directors for violations of that Act.

III.

Argument for Plaintiffs in Error.

1. The motion to quash and dismiss the Writ of Error, is founded, it is supposed, on the notion that the judgment of the State court is not a final judgment.

Whereas it is plain, on inspection of the record, and of the opinion of Rapallo, J., in the Court of Appeals, that the judgment of that court is final; for the questions there determined

against the plaintiffs in error cannot in this action be readjudicated in the State court. They have been finally decided by the highest court of the State, and cannot be raised anew in this suit.

The case is different from one where a new trial is ordered upon some question that the evidence may affect. No evidence can change the determination of the Court of Appeals as to the questions decided in this case. The questions adjudicated are pure questions of law; and have, so far as this case is concerned in the State courts, been finally decided by the court of last resort.

If those questions have been erroneously decided by the Court of Appeals of New York, the only method available to the plaintiffs in error to correct the erroneous judgment against them is by writ of error from this Court. They would waive further contest on those questions by withdrawing their demurrer to the complaint, and answering upon matters of fact. The only and the proper method of raising the points at issue, which are pure questions of law, is by demurrer; and to withdraw the demurrer under the leave given by the New York Court of Appeals, would waive all possible opportunity of further contest as to those questions of law. The plaintiffs in error decline the leave to withdraw the demurrer.

The judgment below is, therefore, a final judgment of the State Court, within the meaning of the Judiciary act, and is subject to review in this Court; forasmuch as the questions involved arise under a law of the United States.

There is no averment in the complaint sufficient to make this an action for breach of trust at common law. The *gravamen* of the complaint is alleged violations of the provisions of the National Currency Act. Gilbert, J., in the General Term of the Supreme Court, held there were not averments in the complaint sufficient to state a common law liability.

By the demurrer the plaintiffs in error claimed the right, privilege and immunity, under the National Currency Act, of having the question of their liability under that Act decided by a Federal court;

Act of Congress of Feb. 1867; 20 Wall. 592
Murdock v. City of Memphis, 20 Wall. 591, 632.

R. S. R. S. 5209.

That claim was denied by the highest court in the State of New York, and the decision was final. There is a Federal question involved, and the writ of error is proper.

The demurrer raised the question of want of jurisdiction in the State court; and that it should not be withdrawn, the following remarks are intended to show.

FIELD, J., in Williams *v.* Bruffy, 102 U. S. 255, said: "Whenever the highest court of a state, by any form of decision, affirms or denies the validity of a judgment of an inferior court, over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision, if it involve a Federal question, will, upon a proper proceeding, attach."

See, also, Atherton *v.* Fowler, 91 U. S. 143.

2. It was error for the New York Court of Appeals to hold that the State Court had jurisdiction of the action.

It arose under the National Banking Act, and was intended to involve, and does involve, an interpretation or construction of several of the provisions of that law; and it seeks a recovery of one of the penalties the act imposes.

Without reference to those provisions, and a favorable interpretation or construction of them, the plaintiff in the action could not maintain it. The plaintiff below has set forth alleged violations of various provisions of the Currency Act; and, necessarily, must insist upon his interpretation or construction of them before he can claim the relief he demands, and before any judgment in his favor can be rendered for the penalties claimed.

By reference to the complaint it will be apparent that the action is not founded upon any negligence cognizable at common law, irrespective of the Act of Congress already mentioned, nor upon any grievance that an action at common law could redress by awarding the penalty claimed; but the action is specifically based upon an asserted violation of certain sections of the National Bank Act, and a claim is made to recover the penalty it imposes. The language of the complaint is unmistakable in those particulars.

The words of the section relied on are followed. No averment of a wrongful intent is contained in the complaint, which is indispensable in an action on a common law liability.

Now, for a violation of those provisions, the Act itself declares the penalties or liabilities incurred, and it makes provision for the proceeding to enforce them in a Federal Court.

No State Court has jurisdiction to enforce those penalties or liabilities; nor is a stockholder authorized to pursue them. On the contrary, the action must be brought in a Federal Court, and section 5,239 of the U. S. R. S. provides that the suit shall be brought by the Comptroller of the Currency.

The National Banking Act specifies certain acts which are to be done, and certain other acts which are not to be done, as directions for the management of associations organized under that statute. Section 5,239 was intended to secure compliance with those provisions. A forfeiture of all the rights, privileges and franchises of the association is one of the penalties for a violation of those provisions. Another penalty is, that every director who knowingly participated in, or assented to the same, shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation.

It is plain that if the directors of the National Bank of Fishkill have been guilty of a violation of the provisions referred to,—in other words, have been knowingly guilty of the acts and negligences attributed to them in the complaint in this action,—the Comptroller of the Currency can bring his suit in a Federal Court for the redress of those wrongs; and therein the penalties prescribed can be adjudged.

But if, for the same alleged acts, a suit can be maintained in the State Court by a stockholder of the bank, without the intervention of the Comptroller, then a double penalty can be inflicted on the directors—one of them founded upon the statute; the other upon the supposed common law liability.

It is familiar law that where a statute creates a new right or offense, and provides a specific remedy or punishment, they alone apply.

Farmers & Mech. Nat. Bank v. Dearing, 91 U. S. Rep. 29.
Barnet v. National Bank, 98 U. S. Rep. 558.

The New York Court of Appeals, in the opinion there delivered, admits that the turning point in this case, is the question of the right to bring this action, without resort to the Comptroller of the Currency; and the answer that court makes to the objection of the right of a stockholder to bring the suit is in the following words:

"But if the Receiver represents the bank, and is the proper party to prosecute, then we think enough is shown to justify the stockholders in applying directly to the court for relief. The causes of action set forth in the complaint are losses and misapplications of the funds of the bank through the negligence and misconduct of its directors."

The fallacy of this position of the New York Court of Appeals will appear when reference is had to the complaint in the action. It is not framed on a common law precedent. The association itself is a defendant; and it is joined with the directors, as a party proceeded against. The causes of action alleged are precisely those under the Act of Congress, which call for a forfeiture of the rights, privileges and franchises of the association, and for the liability of the participating or assenting directors.

The remedy, and the form and forum of procedure, to redress such wrongs are set forth in Sec. 5,239, of the U. S. R. S., which reads as follows:

"If the Directors of any National Banking Association shall "knowingly violate or knowingly permit any of the officers, "agents, or servants of the association to violate any of the pro- "visions of this title, all the property, privileges, and franchises "of the association shall be thereby forfeited. Such violation "shall, however, be determined and adjudged by a proper Circuit, "District, or Territorial Court of the United States, in a suit "brought for that purpose by the Comptroller of the Currency "in his own name, before the association shall be declared dis- "solved. And in cases of such violation every director who par- "ticipated in, or assented to, the same, shall be held liable in his "personal, and individual capacity, for all damages which the "association, its shareholders, or any other person shall have "sustained, in consequence of such violation."

Now, suppose the Comptroller of the Currency should bring an action for the alleged misfeasances charged in the complaint, and

upon a trial in the proper Federal court it should be there held that the alleged acts, or negligences as proved, did not amount to a violation of the provisions of the National Banking Act, is it allowable for stockholders to resort to the cumulative remedy in a State court, which is permitted by the decision of the New York Court of Appeals, and to disregard the provisions of Sec. 5,239, of the National Banking law, by bringing their action in the State courts, where a different result may be reached?

So far as the association itself is concerned, the New York Court of Appeals admits that "it would of course be very inap- "propriate that such a proceeding should be instituted by a Re- "ceiver who has only to deal with the assets of the bank;" and that Court admits the propriety of the requirement, that "the "violation should be adjudged by a court of the United States, "at the suit of the Comptroller," and that the form of proceeding is, by the terms of the section, made essential. "But," says the New York Court of Appeals, "there is nothing in the Act which renders it essential for any other purpose."

That view, it is respectfully submitted, loses sight of the intelligent purpose of the National Banking Act. Section 5,239 was designed to secure compliance with the provisions of the act *under certain penalties therein prescribed;* one of which is a forfeiture of the rights, privileges and franchises of the association; and another of which is, in cases of such violation, every director who participated in, or assented to, the same, shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.

The plain import of this language is, that the act or negligence which shall carry with it a forfeiture of the rights and franchises of the association, shall be the act or negligence of the directors *as a body;* and personal liability is cast upon the individual directors who have participated in, or assented to, the same.

It would be a strained and unreasonable construction of the words in which this statutory enactment is expressed, to hold, as the New York Court of Appeals has done, that directors, in their isolated capacity may, by their individual acts or negligences, involve the association in the forfeiture of the rights, privileges and franchises of the association, and become answerable for the per-

sonal penalties which the statute creates. The violation of the law denounced by the section is not of that character; but it is, rather, an official violation by the directors, acting as a body. And it is when "*such violation*" has been adjudged in a Federal Court in a suit brought by the Comptroller of the Currency, that the participating or assenting directors are made personally liable for damages to the association, its shareholders, and any other person.

The statute declares that the directors shall be thus liable for damages "*sustained in consequence of such violation.*" Not, therefore, for damages for individual breaches of trust, for which they might be chargeable at common law; but for the statutory damages for the associated or official violation by the directors while acting as a body.

According to the doctrine asserted by the New York Court of Appeals, the stockholders may, in a State Court, pursue the directors for any violation of provisions of the act, by their individual behavior, irrespective of their acts as a body; and finding what, in a State Court, may be denominated breaches of trust, or negligences of that character, may mulct the delinquent directors in the statutory damages, though in their relation to the association while acting in their associate capacity as a body, no delinquency appears. That doctrine cannot be sound, and it finds no support in the provisions of the Act of Congress.

Doubtless the Receiver represents the association and its creditors, and is the proper party to bring suits, to recover any assets or claims belonging to the association, and he may sue in the State Courts.

Kennedy v. Gibson, 8 Wall. 506.

But, in respect of penalties to be visited on the association, and of the liabilities of its directors for a violation of the National Banking Act, it is declared, by the act itself, that the suit shall be brought in a Federal Court by the Comptroller of the Currency.

Because the State Courts have jurisdiction, independent of any statute, of suits for violations of duty, and breaches of trust, by directors of corporations, is no reason for holding that the particular violations of the National Banking Act, made penal by that law, and alleged by the complaint in this case, are subjects of adjudication in the State Courts, especially when the act itself has

provided that the adjudication shall be made in a Federal tribunal at the suit of the Comptroller of the Currency; and when, too, the penalties and liabilities for that violation are prescribed by the act. The New York Court of Appeals, in its opinion, has cited a number of authorities to show that jurisdiction exists in the State Court to entertain suits for violation of duty and breaches of trust by directors of corporations; that such suits should be brought in the name of the corporation or of its Receiver; and that when they refuse, the shareholders may sue in equity; yet, conceding that undisputed doctrine, it does not help the shareholder who has brought this action; for it is not an action of that character, but is an action grounded on those particular violations of the Banking Act, which are, by the act itself, referred to the Federal Courts for adjudication, in a suit to be brought by the Comptroller.

The Comptroller was never asked in this case to bring, and has never refused to bring, any action so as to entitle the shareholder who precipitated this action to bring a suit in equity. The Receiver had no power to bring it without his authority. There is ample provision made by the Banking Act for the supposed wrongs alleged without invoking the action of the State Courts.

As these are questions arising under and involving a construction of the Act of Congress already named, there was proper ground for the issuing and allowance of the writ of error in this case, and the motion to quash it should be denied.

3. The plaintiffs in error were Directors of the National Bank of Fishkill; and, as such, took and subscribed the statutory oath faithfully to discharge their duties.

One of those duties was to furnish the Comptroller of the Currency with accurate periodical statements of the condition of the bank; another was to employ competent officers, and take from them proper security; another was to keep honest accounts, and another, not negligently to permit the property of the bank to be squandered or stolen, or its affairs to be improperly managed.

The complaint alleges in general terms, a failure by the Directors to observe those obligations thus imposed upon them by the Act of Congress.

What connection has the Receiver, as such, with those alleged delinquencies? He is an officer appointed by the Comptroller, and is under his direction and control; and he cannot be charged officially, or individually, for the alleged delinquencies of the Board of Directors. Nor is he amenable for having refused to sue the Directors for their alleged neglect of duty. That is the prerogative of the Comptroller.

While section 5,239 remains on the statute book, it is an enactment which directs that suits for the violations mentioned, are to be brought in the Federal courts by the Comptroller of the Currency; and with such suits the Receiver has no concern.

4. It was error for the New York Court of Appeals to decide that the National Banking Law contained no provision giving to the Federal Courts exclusive jurisdiction of suits of the nature of the present action.

Section 5,239 expressly gives to the Comptroller the right, and imposes on that officer the duty, to bring suits in the Federal Courts for a violation of the provisions of the National Banking law, by directors of associations formed under it. The law on the subject is, that the State Court may entertain jurisdiction where it is not excluded by express provision or by necessary implication.

Claflin v. Houseman's Assignee, 3 Otto, 130.

Congress may, if it sees fit, give to the Federal Courts exclusive jurisdiction; and, as remarked by Mr. Justice Bradley, in the case just cited, "This jurisdiction is sometimes exclusive by express enactment and sometimes by implication."

That it is exclusive in a case of this nature, by necessary implication under the section of the banking act already repeated, and that the section gives exclusive jurisdiction to the Comptroller to

bring his suit in the Federal Courts only, seems too plain for argument.

Indeed, so much is conceded, so far as the suit can affect the association.

How, then, when the right of action to forfeit the privileges of the association vests exclusively in the Comptroller, "if the directors knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions" of the act; and the act declares that "*such violation* shall "however be determined and adjudged by a proper circuit, dis- "trict or territorial Court of the United States;" can it rationally be contended that the further consequences of "such violation," declared in the same section, as to the participating or assenting directors, are not intended to be exclusively determined in the same suit of the Comptroller by the Federal Court?

There is a palpable inconsistency in making the jurisdiction exclusive as to a portion of the section, and not as to the whole of it; and certainly there could have been no intention of Congress to require a Federal Court to adjudge "such violation" for one purpose only, and to permit a State Court to adjudge it for another purpose.

For the wrongs complained of by the complaint in this action the National Banking Act has provided ample means of redress by a suit in the name of the proper officer in a Federal forum; and it would lead to confusion, diversity of judgments, and oppression, to permit the State Courts to take cognizance of them at the instance of every disaffected shareholder.

Such an interference with the administration of the affairs of the National Banks is certainly to be deprecated, and could not have been contemplated by Congress in the well-considered provisions of the National Currency Act.

In the *Farmers Bank v. Dearing*, 91 *U. S. Rep.* 34, it was held by this court that the States can exercise no control over National Banks, nor in any wise affect their operation, except in so far as Congress may permit.

It is manifest that if State Courts can entertain jurisdiction of actions against the Directors of National Banks for alleged violations of the Act under which they are organized, the operations of the Banks will be thereby affected, and their existence imper-

illed. The State Courts may hold certain acts of management unlawful and a violation of the Act of Congress, while the Federal tribunal may hold otherwise. A director's liability arises out of his relation to the bank and the obligations imposed upon him by the Act of Congress under which it is organized ; and he should not be subjected to the uncertain and fluctuating notions of his liability which State Courts may hold is imposed on him.

National Banks are fiscal agents of the Federal government, and if the directors who manage them are, in respect of their management, to be held answerable for penalties or liabilities imposed by the judgments of the State Courts, their functions and powers would be thereby affected, and the banks themselves, by inevitable consequence, crippled and injured.

The remedy for the negligence and mismanagement of directors of national banks in the performance of their duties has been confided to the Comptroller of the Currency, that it should be prosecuted in such form as to protect the creditors as well as the stockholders. Legal priorties among either class are not allowable, when the affairs of the banks are wound up.

Boon on Corp., § 142.
Thompson on liability of Directors, 351.
Smith v. Hurd, 12 Met. 249.

The corporation is the legal entity in which the property is vested. It represents all the parties concerned. Its officers are the servants of the corporation, and not of the shareholders, and any injury suffered by their mismanagement is an injury to the corporation. Creditors have the prior interest in any recovery for such injury ; and the shareholders can only claim the surplus after the creditors are paid. If, therefore, the shareholders can institute suits like the present one, much more should the creditors have such right. Complicated, vexatious and unnecessarily expensive would the winding up of the affairs of a national bank become, in such a condition of things.

For obvious reasons, therefore, has the Comptroller of the Currency been vested with authority to direct and control all proceedings necessary to the winding up of a national bank. A Receiver has not the power. He cannot declare or pay a dividend except as directed by the Comptroller.

There was sufficient reason, therefore, why the Act of Congress should confer on the Comptroller alone the right to prosecute an action of this nature in the Federal courts, and by necessary implication the jurisdiction thus conferred is exclusive.

The motion to quash or dismiss the writ of error in this case, should be denied, with costs.

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